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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 389

DEPARTMENT OF REVENUE, PETITIONER,

vs.

JAMES B. BEAM DISTILLING COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR CERTIORARI FILED AUGUST 20, 1963

CERTIORARI GRANTED OCTOBER 14, 1963

SUPREME COURT OF THE UNITED STATES

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JAMES B. BEAM DISTILLING COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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[fol. 1]

[File endorsement omitted]

IN THE COURT OF APPEALS OF KENTUCKY

JAMES B. BEAM DISTILLING COMPANY, Appellant,**v.****DEPARTMENT OF REVENUE, Appellee.**

STATEMENT OF APPEAL—Filed July 17, 1961

The name and address of Counsel for Appellant is: Millard Cox, 1021-1023 Kentucky Home Life Building, Louisville 2, Kentucky.

The names and address of Counsel for Appellee are: William S. Riley, Paul D. Ross, Hal O. Williams, Department of Revenue, Frankfort, Kentucky.

The name and address of the trial Judge is: Honorable Henry Meigs, Franklin Circuit Court, Frankfort, Kentucky.

The judgment appealed from was entered June 9, 1961 (R. pp. 26-29).

The Notice of Appeal was filed June 21, 1961 (R. p. 32).

The jurisdictional amount in controversy on appeal as shown by the record (R. p. 8) is \$5,107.09.

Millard Cox, Counsel for Appellant.

[fol. 4]

[File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action File No. 60459

JAMES B. BEAM DISTILLING Co., Petitioner,

v.

DEPARTMENT OF REVENUE, Respondent.

PETITION OF APPEAL—Filed February 9, 1961

On April 27, 1960, Petitioner, James B. Beam Distilling Co., filed with the Department of Revenue its claim for refund of certain import taxes. The Department of Revenue denied said claim June 10, 1960. Thereafter on June 16, 1960, Petitioner filed a Petition for Review before the Kentucky Tax Commission. On February 1, 1961, by Order Number 2861, the Kentucky Tax Commission affirmed the ruling of the Department of Revenue and denied the Petitioner's claim to a refund.

Petitioner asks that the Franklin Circuit Court overrule the Orders of the Department of Revenue and the Kentucky Tax Commission and enter a Judgment in favor of Petitioner for a refund of said taxes.

Millard Cox, 1022 Kentucky Home Life Bldg.,
Louisville 2, Kentucky, Attorney for James B.
Beam Distilling Company, Tel. No. JUniper
3-0291.

[fol. 5]

IN THE FRANKLIN CIRCUIT COURT
Civil Action No. 60459

JAMES B. BEAM DISTILLING COMPANY, Appellant,

v.

DEPARTMENT OF REVENUE, Respondent & Appellee.

(Commonwealth of Kentucky)

SUMMONS ON APPEAL

To the Sheriff of Franklin County

The Commonwealth of Kentucky to the Above-Named Defendant:

You are hereby summoned and required to serve upon Millard Cox, appellant's attorney, whose address is Kentucky Home Life Building, Louisville, Kentucky, an answer to the statement and petition of appeal herein, within 20 days after service of this summons upon you, exclusive of the day of the service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the statement and petition of appeal.

Witness Kelly C. Smither, Clerk of said court, this the 9th day of February, 1961.

Kelly C. Smither, Clerk Franklin Circuit Court.

By Virginia S. Marris, D.C.

4
[fol. 6] [File endorsement omitted]

**BEFORE THE KENTUCKY TAX COMMISSION
COMMONWEALTH OF KENTUCKY**

**PETITION FOR REVIEW OF THE ACTION OF THE DEPARTMENT
OF REVENUE IN DENYING A REFUND OF CERTAIN IMPORT
TAXES PAID BY JAMES B. BEAM DISTILLING COMPANY
UNDER THE PROVISIONS OF K.R.S. 243.680 (2)—Filed
June 16, 1960**

Paragraph 1

On April 27, 1960 James B. Beam Distilling Company filed a written application for the refund of certain taxes paid on distilled spirits imported into Kentucky from Scotland between the dates of September 1, 1959 and April 1, 1960 under the provisions of K.R.S. 243.680 (2). Reference to said written application is hereby made and it is hereby incorporated as a part of this Petition for Review as though copied in full herein.

Paragraph 2

On June 10, 1960, in a letter signed by Hon. Froman Rateliff, Supervisor, Miscellaneous Tax Section, the Department of Revenue denied the refund of said taxes.

Paragraph 3

The Taxpayer requests that the Kentucky Tax Commission review the final action of the Department of Revenue in denying said refund and as grounds for review states that the statute, K.R.S. 243.680 (2), under which said taxes were collected is unconstitutional because it is in conflict with Article I Sec. 10 Clause 2 of the Constitution of the United States; and that the Department of Revenue was, therefore, in error in denying said refund.

[fol. 7] Millard Cox, Attorney for James B. Beam
—Distilling Company, 1022 Kentucky Home Life
Building, Louisville 2, Kentucky, Tel.—JU 3-0291.

June 13, 1960

Received this 16th day of June 1960.

Kentucky Tax Commission

by Georgia Moffett

[fol. 8]

[File endorsement omitted]

BEFORE THE DEPARTMENT OF REVENUE
COMMONWEALTH OF KENTUCKY

Application by James B. Beam Distilling Company for
refund of import taxes paid under the provisions of
K.R.S. 243.680 (2).

STATEMENT OF FACTS—Filed April 27, 1960

James B. Beam Distilling Company (hereinafter referred to as "the taxpayer") is a Corporation organized under the laws of Illinois.

Taxpayer is engaged in the business of manufacturing, warehousing, bottling, importation and sale of distilled spirits products; and, as such, owns and operates plants at Clermont and Beam in Bullitt and Nelson Counties, Kentucky.

Taxpayer is licensed by the laws of the United States and the State of Kentucky to conduct its operations under the following permits:

Distiller's permit (Ky.) DT-157

Distiller's permit (U.S.) DSP-KY-230

Importer's permit (U.S.) CIN-I-131

During the year 1959, the taxpayer entered into an agreement with W. A. Gilbey Limited of London, England (hereinafter referred to as "Gilbey"), under the terms of which the taxpayer as a licensed U. S. importer was granted the exclusive right to buy from Gilbey for importation, sale and distribution in the United States. Gilbey's product known as Gilbey's Spey Royal Scotch Whiskey.

Between the dates of September 1, 1959 and April 1, 1960, the taxpayer, acting under its agreement with Gilbey and pursuant to the authority of its U. S. and Kentucky import [fol. 9] permits, has purchased from Gilbey and imported from Scotland into the United States and the State of Kentucky 51,070.94 proof gallons of Gilbey's Spey Royal Scotch Whiskey.

For each act of importation, the taxpayer, acting under the requirements of K.R.S. 243.680 (2), applied to and received from the Department of Revenue of the Commonwealth of Kentucky an import permit authorizing the taxpayer to bring into Kentucky from Scotland the quantity of Scotch whiskey shown on the permit. As a condition precedent to the issuance of said import permits, the Department collected from the taxpayer import taxes at the rate of ten cents per proof gallon for each proof gallon shown on the permit.

Following are the several dates of issuance of said import permits by the Commonwealth of Kentucky, the quantities of Scotch whiskey imported into Kentucky under each of said permits and the amount of the import tax collected by the Kentucky Department of Revenue as a condition precedent to the issuance of each of said permits.

<u>Permit No.</u>	<u>Date of Issuance</u>	<u>Proof Gals.</u>	<u>Tax Paid</u>
58569	Sep. 29, 1959	6434.80	643.48
58849	Oct. 20, 1959	5968.00	596.80
58934	Oct. 26, 1959	6013.80	601.38
59096	Nov. 9, 1959	2291.52	229.15
59097	Nov. 9, 1959	17990.70	1,799.07
59402	Nov. 30, 1959	208.32	20.83
60611	Mar. 16, 1960	9120.00	912.00
60715	Mar. 24, 1960	3043.80	304.38
	Totals	51070.94	5,107.09

All of the aforesaid Scotch whiskey was loaded on ship-board by the vendor at Glasgow, Scotland and entered the United States at the ports of Chicago and New Orleans; was shipped by common carrier to Louisville where it was received by Robert Ice Truck Lines of Shepherdsville, Ken-

tucky and transported by truck, belonging to said truck lines, from Louisville to Clermont, Kentucky where it was [fol. 10] all received in original packages by the taxpayer into its Class 2 and 8 U. S. Customs Bonded Warehouses.

At the time of the receipt of said whiskey into its Class 2 and 8 U. S. Customs Bonded Warehouses, the Commonwealth of Kentucky had collected and the taxpayer had paid all of the Kentucky import taxes listed above. As evidence of said collection and payment, the taxpayer files herewith photostats of the several permits which granted the taxpayer the right to bring into the Commonwealth of Kentucky the Scotch whiskey described therein; and showing the amount of the tax paid on each such act of importation.

Basis For Claim of Refund

1. Kentucky Revised Statutes 243.680 (2) reads as follows:

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

2. Section 243.680 (2) of Kentucky Revised Statutes is in conflict with Article I Sec. 10 Clause 2 of the Constitution of the United States which provides:

[fol. 11] "No State shall, without the consent of the Congress, lay any Imposts, or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: and the net Produce of all Duties and Imposts, laid by any State on Imports, or Exports shall be

for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

3. All of the taxes paid to the Commonwealth of Kentucky by the taxpayer on whiskey which it has imported from Scotland have been collected from the taxpayer under the provisions of an unconstitutional statute. Taxpayer is therefore entitled to and hereby claims a refund of any and all of such taxes as have heretofore been paid or which may hereafter be paid by the taxpayer pursuant to the provisions of K.R.S. 243.680 (2) and the Regulations of the Department of Revenue promulgated thereunder.

Millard Cox, Attorney for James B. Beam Distilling Company, 1622 Kentucky Home Life Building, Louisville 2, Kentucky, Tel.—JU 3-0291.

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 58569

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W & A Gilbey Ltd. Glasgow, Scotland
110 bbls. of Scotch whisky 101 to 110 Proof

Quantity	Tax Paid
1. Wine gallons..... <u>5305.4</u>	4. Tax at 10¢ per proof gallon..... <u>\$ 613.48</u>
2. Proof..... <u>101 to 110</u>	5. Less credit certificates attached..... <u>00</u>
3. Proof gallons (1 x 2)..... <u>6134.8</u>	6. Net remittance..... <u>\$ 613.48</u>

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO., DBA GLEN SPEY LTD.
Applicant

By M. O. Melan

Atty-in-fact
Subscribed and sworn to before me this 28 day

of September, 1959.

NOTARY PUBLIC Marguerite Corbett

My commission expires 1/26/60

Mail to: JAMES B. BEAM DISTILLING CO.
DBA GLEN SPEY LTD.
CLEMONT, KENTUCKY

Applicant's Kentucky License No. DT-157

IF DISTILLER

Registered Distillery No. DSP KY 230

ISSUED AS PERMIT at Frankfort, Kentucky,
this 2 day of SEP 29 1959

Not valid after DEC 29 1959, 1959

DEPARTMENT OF REVENUE

By Froman Ratchiff

Supervisor, Alcoholic Beverage Taxes

[fol. 12]

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W & A Gilbey Ltd. Glasgow, Scotland

100 Bottles 101 to 110 Proof Scotch Whisky

Quantity	Tax Paid
1. Wine gallons..... <u>4052.6</u>	4. Tax at 10¢ per proof gallon..... <u>\$ 596.80</u>
2. Proof..... <u>101 to 110</u>	5. Less credit certificates attached..... <u>00</u>
3. Proof gallons (1 x 2)..... <u>5968.0</u>	6. Net remittance..... <u>\$ 596.80</u>

SUBMITTED IN APPLICATION

JAMES B. BEAN DISTILLING CO.

Applicant

By A. O. Wilson

Atty-in-fact

Subscribed and sworn to before me this 19 day

of October 1952

NOTARY PUBLIC Thermon C. Ruff

My commission expires 4/26/60

Applicant's Kentucky License No. DT-157

IF DISTILLER

Registered Distillery No. DSP KY 230

ISSUED AS PERMIT at Frankfort, Kentucky,

this 19 day of OCT 20 1952

Not valid after JAN 20 1960 1952

DEPARTMENT OF REVENUE

By:

Froman Ratcliff

Supervisor, Alcoholic Beverage Taxes

Mail to:

JAMES B. BEAN DISTILLING CO.
CLERMONT, KENTUCKY

[fol. 13]

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Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 58934

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W & A Gilbey LTD. Glasgow, Scotland

100 bbls. Scotch whiskey 101 to 110 proof

City

State

Quantity		Tax Paid	
1. Wine gallons	<u>4894.1</u>	4. Tax at 10¢ per proof gallon	<u>\$ 601.38</u>
2. Proof	<u>101 to 110</u>	5. Less credit certificates attached	<u>00</u>
3. Proof gallons (1 x 2)	<u>6013.8</u>	6. Net remittance	<u>\$ 601.38</u>

SUBMITTED IN APPLICATION

JAMES B. BEAN DISTILLING CO.

Applicant

By M. O. Nelson Atty-in-fact

Subscribed and sworn to before me this 23 day
of October 1959

NOTARY PUBLIC Marjorie C. Cothett
My commission expires 4/26/60

Applicant's Kentucky License No. <u>DT-157</u>
IF DISTILLER
Registered Distillery No. <u>DSP KY 230</u>

ISSUED AS PERMIT at Frankfort, Kentucky,
this 26 day of OCT 1959

Not valid after JAN 26 1960 19

DEPARTMENT OF REVENUE

By Froman Ratcliff

Supervisor, Alcoholic Beverage Taxes

Mail to: JAMES B. BEAN DISTILLING CO.
CLERMONT, KENTUCKY

[fol. 14]

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Revised Form 548

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 59096

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from Ogilby & Co. Limited, Glasgow, Scotland

1100 cc Fifth Scotch whisky 65.6 proof

Quantity	Tax Paid
1. Wine gallons..... <u>2640.00</u>	4. Tax at 10¢ per proof gallon..... <u>\$ 229.15</u>
2. Proof..... <u>65.6</u>	5. Less credit certificates attached..... <u>00</u>
3. Proof gallons (1 x 2)..... <u>2291.82</u>	6. Net remittance..... <u>\$ 229.15</u>

SUBMITTED IN APPLICATION

JAMES B. BEAN DISTILLING CO.

Applicant

By M. O. Melan

Attorney-in-fact

Subscribed and sworn to before me this 4 day

of November 1959

NOTARY PUBLIC

My commission expires 4/26/60

Mail to: JAMES B. BEAN DISTILLING CO.
CLERMONT, KENTUCKY

DT-157
Applicant's Kentucky License No. _____
IF DISTILLER
Permit No. <u>DSP KY 230</u>

ISSUED AS PERMIT at Frankfort, Kentucky,

this NOV 9 day of 1959

Not valid after FEB 9 1960, 19

DEPARTMENT OF REVENUE

By

Freeman Patchiff

Supervisor, Alcoholic Beverage Taxes

[Vol. 15]

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 59097

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from Gilbey Spys Limited, Glasgow, Scotland

300 barrels Scotch whiskey 121 Proof

Quantity	Tax Paid
1. Wine gallons..... <u>14711.6</u>	4. Tax at 10¢ per proof gallon..... <u>\$ 1,799.07</u>
2. Proof..... <u>121</u>	5. Less credit certificates attached..... <u>0</u>
3. Proof gallons (1 x 2)..... <u>17990.7</u>	6. Net remittance..... <u>\$ 1,799.07</u>

SUBMITTED IN APPLICATION

JAMES B. BEAN DISTILLING CO.

Applicant

By M. O. Nelson

Atty-in-fact

Subscribed and sworn to before me this 1 day

of November, 1959

NOTARY PUBLIC

My commission expires 4/26/60

Mail to: JAMES B. BEAN DISTILLING CO.
CLERMONT, KENTUCKY

Applicant's Kentucky License No. <u>DT-157</u>
IF DISTILLER
Importation Certificate No. <u>DSP KY 230</u>

ISSUED AS PERMIT at Frankfort, Kentucky,
this 2 day of NOV 9 1959

Not valid after FEB 9 1960 19

DEPARTMENT OF REVENUE

By:

Froman Patchiff

Supervisor, Alcoholic Beverage Taxes

[fol. 16]

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from Gilbey Spey Limited

Glasgow, Scotland

Vendor

Street and No.

City

State

100 cs. Fifths Quantity Gilbeys Spey Royal, 12 yr. 86.8 proof.

1. Wine gallons.....	240.00	4. Tax at 10¢ per proof gallon.....	\$ 20.83
2. Proof.....	86.8	5. Less credit certificates attached.....	
3. Proof gallons (1 = 2).....	208.32	6. Net remittance.....	\$ 20.83

SUBMITTED IN APPLICATION

JAMES B. BEAM DISTILLING CO.

Applicant

By M. C. Whelan

ATTORNEY IN FACT

Subscribed and sworn to before me this 25th day

of November 1959

NOTARY PUBLIC Marguerite C. Bell

MY COMMISSION EXPIRES APRIL 26, 1960.

Mail to:

JAMES B. BEAM DISTILLING CO.
CLERMONT, KENTUCKY

Applicant's Kentucky License No. <u>DT-157</u>
IF DISTILLER
Superintendent's No. <u>LSP-KY-230</u>

ISSUED AS PERMIT at Frankfort, Kentucky,

this day of NOV 30 1959 19

Not valid after FEB 30 1960 19

DEPARTMENT OF REVENUE

By:

Froman Ratcliff

Supervisor, Alcoholic Beverage Taxes

[fol. 17]

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. **60611**

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from **W & A Gilbey Ltd. London, England, C/O Collects of Customs, New Orleans, La.**

Quantity	Street and No.	City	State
150 Bbls Scotch Whiskey 125 Proof			
1. Wine gallons.....	7,206.0	4. Tax at 10c per proof gallon.....	\$ 912.00
2. Proof.....	12.5	5. Less credit certificates attached.....	00
3. Proof gallons (1 x 2).....	9,120.0	6. Net remittance.....	\$ 912.00

SUBMITTED IN APPLICATION

JAMES B. DEAN DISTILLING CO.
Applicant

By *M. C. Milon*
Atty-in-fact

Subscribed and sworn to before me this 15 day
of March 19 60

NOTARY PUBLIC *Thaquerie C. Ruff*
My Comm. Expires 11/20/60

JAMES B. DEAN DISTILLING CO.
Mail to: **CLEVELAND, KENTUCKY**

Applicant's Kentucky License No. **DT-157**

IF DISTILLER

Registered Distillery No. **ESP KY 230**

ISSUED AS PERMIT at Frankfort, Kentucky,

this 16 day of **MAR 16 1960**

Not valid after **JUN 16 1960** 19 60

DEPARTMENT OF REVENUE

By *Froman Ratcliff*

Supervisor, Alcoholic Beverage Taxes

[fol. 19]

Commonwealth of Kentucky
DEPARTMENT OF REVENUE
Frankfort

Permit No. 60215

PERMIT TO IMPORT DISTILLED SPIRITS

(Not valid unless signed below by an official of the Department of Revenue)

The Department of Revenue, Commonwealth of Kentucky, grants to the applicant a permit to import to the Commonwealth of Kentucky the distilled spirits specified below.

from W. A. Gilbey Ltd. London England, C/O Collectors of Customs, New Orleans, La.
50 Hls Scotch Whiskey 125 Proof

Quantity	Tax Paid
1. Wine gallons <u>2,435.0</u>	4. Tax at 10c per proof gallon <u>\$ 304.38</u>
2. Proof <u>125</u>	5. Less credit certificates attached <u>00</u>
3. Proof gallons (1 x 2) <u>3,043.8</u>	6. Net remittance <u>\$ 304.38</u>

SUBMITTED IN APPLICATION

JAMES B. BEAN DISTILLING CO.
Applicant

By M. C. [Signature]
Atty-in-Fact

Subscribed and sworn to before me this 22 day
of March 19 60

NOTARY PUBLIC [Signature]
My comm. expires 4/26/60

Mail to: JAMES B. BEAN DISTILLING CO.
CLEMONT, KENTUCKY

Applicant's Kentucky License No. <u>DT- 157</u>
IF DISTILLER
Registered Distillery No. <u>DSP KY 230</u>

ISSUED AS PERMIT at Frankfort, Kentucky,
this 22 day of MAR 1960

Not valid after JUN 24 1960 1960

DEPARTMENT OF REVENUE

By Froman Kitchell

Supervisor, Alcoholic Beverage Taxes

[fol. 19]

[fol. 20] [File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION

AFFIDAVIT OF MRS. RUTH B. CAREY, LICENCED U. S. CUSTOM HOUSE BROKER—Filed November 14, 1960

The affiant, Mrs. Ruth B. Carey, states that she is a resident of Louisville, Jefferson County, Kentucky, that for sixteen years she has engaged in the business of Custom House Broker and is duly licensed to act as such under rules and regulations prescribed by the Secretary of the Treasury of the United States pursuant to the authority contained in 19 U.S.C. §1641; that a licensed Custom House Broker must be a person of good moral character, possessing such special knowledge of Customs Laws and Regulations as will qualify him to render valuable service to importers and exporters.

Affiant states that she has represented James B. Beam Distilling Company of Clermont, Kentucky for the past year as its Custom House Broker in the connection with said distilling company's importation of Gilbey's Spey Royal Scotch Whiskey from Glasgow, Scotland to Clermont, Kentucky; that she is familiar with all of the procedures by which said importations have been made and that the following step by step narrative account sets forth in essential detail the manner of importation and the procedures followed in accomplishing same:

1. The American importer of Scotch whiskey must be the holder of a "basic permit" issued pursuant to the authority contained in the Federal Alcohol Administration Act (27 U.S.C. 201-211) and Regulations 1 Sub-part C §1.20 reading as follows:

"§1.20 IMPORTERS.—No person, except pursuant to a basic permit issued under the act, shall:

"(a) Engage in the business of importing into the United [fol. 21] States distilled spirits, wine, or malt beverages; or,
(b) while so engaged, sell, offer or deliver for sale, contract

to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported."

2. The "basic permit" referred to above means a formal document issued under the Federal Alcohol Administration Act in the form prescribed by the Director, Alcohol and Tobacco Tax Division, Department of the Treasury, authorizing the person named therein to engage in the activities specified at the location stated. (F.A.A. Regulations 1—§1.9)

3. James B. Beam Distilling Company, hereinafter referred to as "Taxpayer", is the holder of F.A.A. Basic Import Permit CIN-1-131.

4. As a licensed importer, Taxpayer imports from Scotland, Scotch whiskey in casks and bottled cases for sale and distribution in the United States.

5. Taxpayer is the importer of the brand of Scotch whiskey known as "Gilbey's Spey Royal" of which W. A. Gilbey Ltd. of London, England is the distiller and exporter.

6. Upon receipt of an order by Taxpayer, Gilbey fills same by loading the whiskey on shipboard at Glasgow, Scotland whence it customarily proceeds across the Atlantic Ocean and via the St. Lawrence Seaway to the City of Chicago, the port of entry into the United States. Said whiskey is consigned to James B. Beam Distilling Company, Clermont, Kentucky.

7. Upon arrival at Chicago, or other port of entry, the Master of the vessel carrying the Scotch whiskey consigned to Taxpayer is required by U. S. Customs laws to fill out a manifest on a form prescribed by the Secretary of the Treasury. [fol. 22] The manifest, sworn to and signed by the Master, must show: (1) The name of the port at which the merchandise was taken on board and the port of entry of the United States for which the same is destined, particularly describing the merchandise destined for the particular U. S. port of entry; (2) The name, description and build of the vessel, the true measure of the tonnage thereof, the port

to which the vessel belongs and the name of the Master of such vessel; (3) A detailed account of all merchandise on board such vessel, with the marks and numbers of each package and the number and description of the packages according to their usual names, such as barrel, keg, hogshhead, case or bag; (4) The names of the persons to whom such packages are respectively consigned in accordance with the bills of lading issued therefor. (19 U.S.C. §1431)

8. Upon arrival of the whiskey at the port of entry, the importer is required to submit to the steamship line the signed original bill of lading denoting his ownership of the merchandise described therein.

9. Upon compliance with the foregoing requirement, the whiskey is then unloaded, received in customs, and entered for transportation in bond to Louisville under prescribed customs laws and regulations (See 19 U.S.C. §1552)

10. The whiskey is received at the port of entry by a transportation company duly designated by the Secretary of the Treasury as a carrier of bonded merchandise under the provisions of 19 U.S.C. §1551 and transported to Louisville and from there to Clermont, Bullitt County, Kentucky where it is received in its original packages in Taxpayer's U. S. Customs Private Bonded Warehouses established under the provisions of 19 U.S.C. §1555, where the whiskey remains in the sole custody of U. S. Customs officials under [fol. 23] bond until all U. S. taxes and duties have been paid thereon.

11. The taxes and duties are: (1) the tariff or import duty of \$1.27 per U. S. proof gallon on Scotch whiskey 100° or more in proof and \$1.27 per wine gallon if the whiskey is under 100° U. S. proof (Tariff Act of 1930 as amended by Trade Agreement Acts and Executive orders made pursuant thereto); and (2) U. S. Internal Revenue Tax at the rate of \$10.50 per proof gallon. (26 U.S.C. §5001)

12. Before the imported whiskey can be brought from the port of entry into Kentucky, Taxpayer must apply to the Kentucky Department of Revenue for a Kentucky import

permit under the provisions of K.R.S. 243.680 (2) and Regulation PN-13 issued January 16, 1952 and reading as follows:

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining an import permit, Revenue Form 548, either tax-paid or tax-free, from the Department of Revenue showing that payment of required taxes has been made,

"No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits unless a copy of the import permit, Revenue Form 548, which has been attested by an official of the Department of Revenue, accompanies the shipment of distilled spirits into the state and is delivered to the consignee with the shipment.

"No Kentucky licensee shall receive on his premises any shipment of distilled spirits from any Kentucky licensed transporter, railway company, railway express company, boat line, air express company, or any other type of Kentucky licensed carrier, unless copy of the import permit, Revenue Form 548, which has been attested by an official [fol. 24] of the Department of Revenue, accompanies the shipment.

"More than one attested carrier's copy of an import permit may be issued by the Department of Revenue if request is included with application.

"Holders of import permits are required to return all carriers' copies to the Department of Revenue within 90 days from date of issuance. Permits not entirely used shall be returned to the department for credit. Failure to send in all carriers' copies of import permits within the 90-day period will necessitate withholding the issuance of additional import permits until all delinquent copies are returned to the department. If a permit is lost, satisfactory evidence shall be furnished the department in lieu of the permit."

13. Some of the Scotch whiskey imported by Taxpayer is received as originally packaged in Scotland in cases of 12 bottles each and some in the original barrels or casks in which it was shipped from Scotland. That which is brought in in cases is ready for the consumer market following pay-

ment of the Cutoms Duties and U. S. Internal Revenue Tax. The whiskey received in their original barrels or casks from Scotland cannot be sold in the U. S. consumer market until bottled and cased in conformity with U. S. Internal Revenue Laws and Regulations.

14. As to the latter whiskey, i.e. that which is imported in barrels, the Taxpayer makes application to the Collector of Customs in Louisville for permission to withdraw the barrelled whiskey from the bonded warehouse for bottling. Permission is received and the Collector of Customs assigns a Customs Inspector to gauge the whiskey and compute the Import Duties and Internal Revenue taxes due thereon. When the gauge is complete and the duties and taxes paid, [fol. 25] the Taxpayer removes the whiskey from the Customs Bonded Warehouse into its bottling house where, under supervision of a U. S. Storekeeper Gauger, it is reduced in proof to 86.8° by the addition only of distilled water, bottled, labeled, and cased in conformity with applicable U. S. Federal laws and regulations. The whiskey is then ready to be sold on order into the consumer market of the United States.

Mrs. Ruth B. Carey

Subscribed and sworn to before me by Mrs. Ruth B. Carey, this 11th day of November 1960. My commission expires Nov. 9, 1961.

Corinne S. Harrison, Notary Public, Jefferson County, Kentucky.

[fol. 26]

[File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION
COMMONWEALTH OF KENTUCKY

RESPONSE TO THE PETITION FOR REVIEW OF THE ACTION OF THE
DEPARTMENT OF REVENUE IN DENYING A REFUND OF
CERTAIN "IMPORT" TAXES PAID BY JAMES B. BEAM DISTILLING
COMPANY UNDER THE PROVISIONS OF KRS 243.680 (2) AND STATEMENT OF THE DEPARTMENT OF REVENUE
POSITION—Filed January 5, 1961

In response to the Petition of James B. Beam Distilling Company as styled in the caption above, comes William E. Scent, Commissioner of Revenue, for the Commonwealth of Kentucky, and states that the tax in question levied by KRS 243.680 (2) is a license or excise tax on the right to carry on that part of the business conducted by James B. Beam Distilling Company which consists in part of the handling, mixing, processing and selling whiskey manufactured outside of the Commonwealth of Kentucky, including whiskey manufactured in Scotland.

The respondent states that such business is a separate and distinct business from that of manufacturing whiskey within the State of Kentucky, and, as such, is subject to the revenue laws of Kentucky as well as the police regulations of Kentucky.

The tax imposed by Section KRS 243.680 (2), to wit:

“(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

“(b) No railroad company or express company shall receive for shipment or ship into this state any package [fol. 27] or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department.

"(d) A railroad or express company need not obtain a permit to transport distilled spirits, but shall be subject to all regulations of the department."

is imposed on whiskey or other distilled spirits that has not borne the tax imposed by KRS 243.680 (1), to wit:

"No person shall manufacture distilled spirits in this state unless he first obtains from the department a permit to engage in the business of manufacturing distilled spirits. At the time of the issuance of the permit he shall pay to the state a tax of ten cents for each proof gallon of distilled spirits for which the permit is issued."

on whiskey or other distilled spirits manufactured in Kentucky.

The respondent says the tax in question is governed and imposed by KRS 243.690 (1) and (2) which reads:

"(1) No person shall engage in the business of blending, rectifying or mixing distilled spirits, without obtaining from the department a permit to blend, rectify or mix distilled spirits. An excise tax of ten cents is imposed for each proof gallon of distilled spirits that has not borne the tax imposed by KRS 243.680 and which is used in said blending, rectifying or mixing.

"(2) A person engaging in the business of blending, rectifying or mixing distilled spirits shall report on or before the tenth day of the succeeding month, in such form and stating such facts as may be prescribed by the department, the amount of the distilled spirits blended, rectified or mixed during the preceding month. At the time of making the report, he shall pay the tax due under this section."

[fol. 28] The tax in question is absolutely necessary for the execution of the state's regulatory and inspection laws concerning the shipment, sale and handling of distilled spirits within its borders.

The bottled scotch whiskey mentioned in the Petition for Review is offered for sale to any authorized purchaser. It has become part of the mass of property within Kentucky. The state's right to tax the whiskey in its present status is the same as the state's right to tax any other property, or the state's right to license the business of engaging in the sale or mixing or bottling of such distilled spirits or whiskey.

The said whiskey, both barrelled and bottled, is being put to the use for which it was imported. It has ceased to be within the classification of "imports" and any immunity which it might have had in that status is at an end when the state's right to tax begins as above stated.

The regulations and the laws of Kentucky apply to the entire process of carrying on such business from the time the whiskey enters the State of Kentucky until it reaches the final consumer or other authorized purchaser, or is shipped out of the State of Kentucky.

The tax in question and the permit issued on the payment thereof authorizes the conduct of a business separate, distinct and peculiar and, in its many aspects, differing from the business of manufacturing distilled spirits within Kentucky.

A great portion of the whiskey involved in the present hearing is in barrels of 125 proof. It must of necessity be [fol. 29] reduced in proof to 86.8° by adding and mixing with distilled water. Then it must be bottled and labeled in conformity with the Federal laws and the laws of Kentucky before it can be sold.

The tax in question is not a tax on imports. It is collected at time of entry into Kentucky only because that point constitutes the most expeditious and practical time of collection. Payment of the tax is thus made simultaneous with the permit to engage in the business which is provided for by KRS 243.690 (1). (Subsection (2), of course, imposes

the tax in question.) The tax and permit also provide the state with the proper control of the passage of distilled spirits from entry into its borders until final disposition. Such tax also equalizes the tax burden between distilled spirits which are manufactured in Kentucky and those manufactured outside of Kentucky when sold in Kentucky on the competition market.

The statutes above involved concerning the general subject of taxation on distilled spirits must be read and considered under the *pari materia* doctrine.

The tax in question was first imposed by Act of 1934, Chapter 149, page 666 of the Acts of that session of the Legislature; the amount of tax was raised by an Act of the 1956 Legislature, Chapter 114, page 240 of the Acts of that session. Neither by title nor text do those Acts seek to impose a tax on imports.

Paul Ross, Hal O. Williams, for the Department of Revenue.

[fol. 30] [File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION

AGREEMENT TO SUBMIT—Filed January 9, 1961

By agreement of the parties this case is submitted to the Kentucky Tax Commission on James B. Beam Distilling Company's Petition for Review of the Department of Revenue's action denying a refund and the Affidavit of Mrs. Ruth B. Carey and upon the Department's response thereto.

Millard Cox, Attorney for James B. Beam Distilling Company.

Paul D. Ross, Hal Williams, Attorneys for the Department of Revenue.

[fol. 31]

[File endorsement omitted]

BEFORE THE KENTUCKY TAX COMMISSION**JAMES B. BEAM DISTILLING COMPANY, Petitioner,****VS.****DEPARTMENT OF REVENUE, Respondent.****ORDER No. 2,861—Dated February 1, 1961**

By agreement of the parties, this cause is submitted before the Kentucky Tax Commission on the record consisting of the following:

A. James B. Beam Distilling Company's Petition for Review of the action of the Department of Revenue denying a refund of taxes paid under the provisions of KRS 243.680(2) filed June 16, 1960.

B. "Statement of Facts" by the petitioner filed April 27, 1960, and exhibits.

C. Affidavit of Mrs. Ruth B. Carey for Petitioner filed November 14, 1960.

D. Response of Department of Revenue to petitioner's Petition for Review filed January 5, 1961.

E. Agreement of Submission entered January 9, 1961.

Whereupon, the Kentucky Tax Commission affirms the ruling of the Department of Revenue and denies the petitioner's claim to a refund.

This the 1st day of February, 1961.

THE KENTUCKY TAX COMMISSION

William E. Scent, Chairman

Attest:

Georgia Moffett, Secretary

[fol. 32]

CERTIFICATION

I, Georgia Moffett, Secretary of the Kentucky Tax Commission, do hereby certify that the foregoing Petition for Review with Statement of Facts incorporated in such Petition by Paragraph 1 of the Petition; Affidavit of Mrs. Ruth B. Carey, Licensed U. S. Custom House Broker; Response to Petition for Review; Agreement to Submit; and a copy of Kentucky Tax Commission Order No. 2,861 constitute the true and complete record in the case of James B. Beam Distilling Company v. Department of Revenue.

This the 10th day of February, 1961.

Georgia Moffett, Secretary, The Kentucky Tax Commission.

Subscribed and sworn to before me by Georgia Moffett, Secretary of the Kentucky Tax Commission, this the 10th day of February, 1961.

Joyce A. Marse, Notary Public, State-At-Large.

My commission expires: March 29, 1964.

[fol. 33]

[File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT
Civil Action File No.

(Title Omitted)

AGREED ORDER OF SUBMISSION—Filed February 10, 1961.

Come the parties hereto by counsel and agree that this action shall be submitted on the original record as made before the Department of Revenue and the Kentucky Tax Commission. Said record consisting of the following documents is filed herewith:

1. James B. Beam Distilling Company's Petition for Review of the action of the Department of Revenue denying a refund of taxes paid under the provisions of KRS 243.680(2) filed June 16, 1960.

2. "Statement of Facts" by the Petitioner filed April 27, 1960, and exhibits.

3. Affidavit of Mrs. Ruth B. Carey for Petitioner filed November 14, 1960.

4. Response of Department of Revenue to Petitioner's Petition for Review filed January 5, 1961.

5. Agreement of Submission entered January 9, 1961.

[fol. 34] 6. Kentucky Tax Commission Order No. 2861, dated February 1, 1961.

Millard Cox, Attorney for Petitioner.

William S. Riley, Hal Williams, Paul D. Ross, Attorneys for Respondent.

[fol. 35]

[File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT
Civil Action No. 60459

JAMES B. BEAM DISTILLING CO.,

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent.

MEMORANDUM OPINION—June 6, 1961

The "production" tax on distilled spirits is not a tax on "importation" within the meaning of Import-Export Clause of the Federal Constitution. It is not, in the language of the Act, an "import" tax at all, but merely so headed by the reviser of statutes.

By the language of the Act the things sought to be done by plaintiff and which are sought to be taxed by defendant are unquestionably subject to the police power of the State. Whether the point of origin of spirits shipped or transported into this State be Scotland or Indiana is immaterial, as the basis for the levy is not the character of the property, nor the source of its origin, but the privilege of conducting a certain type of business.

When the production resulting from operation of that type of business occurs in Kentucky it is subject to the same kind of tax, long held to be a license tax, measured by the volume of production.

Here, the only difference occurring in the course of the business sought to be subjected to the license tax is that the production or manufacture is accomplished outside of Kentucky and then brought into the State in furtherance of the licensed business. Considering the section (KRS 243.080) as a whole, and the undoubted right of the State, in the exercise of the police power, to prohibit absolutely [fol. 36] and entirely any occupation dealing with or traf-

ficking in distilled spirits, it must follow that nonconfiscatory revenue regulation of such business is within the State's plenary power.

The action of the Kentucky Tax Commission denying plaintiff's claim for refund of tax paid on permits for transporting Scotch whiskey into Kentucky is affirmed.

This 6th day of June, 1961.

Henry Meigs, Judge, Franklin Circuit Court.

[fol. 37]

[File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

JAMES B. BEAM DISTILLING COMPANY,

Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE
COMMONWEALTH OF KENTUCKY,

Respondent.

JUDGMENT—June 9, 1961

This cause having been submitted upon record made before the Kentucky Tax Commission and upon briefs by respective counsel, the Court being sufficiently advised hereby makes the following findings of facts and conclusions of law, to wit:

Findings of Fact

1. The petitioner, James B. Beam Distilling Company, is a corporation organized under the laws of Illinois to engage in the business of manufacturing, warehousing, bottling, distilling and sale of distilled spirits products with a business situs in Kentucky.

2. Pursuant to permits issued by the United States Government and the Commonwealth of Kentucky, the peti-

tioner operates plants at Clermont and Beam in Bullitt and Nelson Counties, Kentucky.

[fol. 38] 3. During the year 1959, the petitioner entered into an agreement with W. A. Gilbey, Limited, of London, England, whereby the petitioner was granted exclusive right to buy from Gilbey, for importation, sale and distribution in the United States, Gilbey's product known as Gilbey's Spey Royal Scotch Whiskey.

4. Between the dates of September 1, 1959, and April 1, 1960, the petitioner purchased from Gilbey and imported into the Commonwealth of Kentucky 51,070.94 proof gallons of the aforesaid scotch whiskey.

5. Pursuant to KRS 243.680 (2), petitioner applied to and received from the respondent permits to transport into the Commonwealth of Kentucky the aforesaid scotch whiskey.

6. Pursuant to the provisions of KRS 243.680 (2), the petitioner paid the tax provided for therein at the rate of 10¢ per proof gallon as appears on copies of the permits filed of record.

7. The aforesaid scotch whiskey was shipped from Glasgow, Scotland, into the Commonwealth of Kentucky.

8. On April 27, 1960, the petitioner filed with the respondent an application for refund of taxes paid as aforesaid.

9. The basis for the petitioner's application for refund is that the taxes collected are in violation of Article I, Section 10, Clause 2, of the Constitution of the United States.

10. By its final ruling dated June 10, 1960, the respondent denied the petitioner's application for refund.

[fol. 39] 11. On June 16, 1960, the petitioner appealed the foregoing final ruling to the Kentucky Tax Commission.

12. By its Order No. 2,861, the Kentucky Tax Commission affirmed the ruling of the Department of Revenue and denied the petitioner's claim to a refund.

13. On February 9, 1961, the Petitioner appealed the foregoing Kentucky Tax Commission Order to the Franklin Circuit Court.

Conclusions of Law

1. The "production" tax on distilled spirits is not a tax on "importation" within the meaning of Import-Export Clause of the Federal Constitution. It is not, in the language of the Act, an "import" tax at all, but merely so headed by the reviser of statutes.

2. By the language of the Act the things sought to be done by petitioner and which are sought to be taxed by respondent are unquestionably subject to the police power of the State. Whether the point of origin of spirits shipped or transported into this State be Scotland or Indiana is immaterial, as the basis for the levy is not the character of the property, nor the source of its origin, but the privilege of conducting a certain type of business.

3. When the production resulting from operation of that type of business occurs in Kentucky it is subject to the same kind of tax, long held to be a license tax, measured by the volume of production.

[fol. 40] 4. The only difference occurring in the course of the business sought to be subjected to the license tax is that the production or manufacture is accomplished outside of Kentucky and then brought into the State in furtherance of the licensed business. Considering the section (KRS 243.680) as a whole, and the undoubted right of the State, in the exercise of the police power, to prohibit absolutely and entirely any occupation dealing with or trafficking in distilled spirits, it must follow that nonconfiscatory revenue regulation of such business is within the State's plenary power.

5. The action of the Kentucky Tax Commission denying petitioner's claim for refund of tax paid on permits for transporting scotch whiskey into Kentucky is proper.

6. Order No. 2861 of the Kentucky Tax Commission is adequately supported by the law and the evidence.

7. Petitioner's appeal is, therefore, without merit and should be dismissed.

Wherefore, it is hereby ordered and adjudged that this appeal be and the same is hereby dismissed; that Order No. 2,861 of the Kentucky Tax Commission be and the same is hereby affirmed; that the respondent recover from the petitioner their costs herein expended.

This the 9th day of June, 1961.

Henry Meigs, Judge, Franklin Circuit Court.

[fol. 41] Have Seen:

Millard Cox, Attorney for Petitioner.

William S. Riley, Paul D. Ross, Hal O. Williams, Attorneys for Respondent.

[fol. 42] [File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT
Civil Action No. 60459

[Title omitted]

STIPULATION AS TO RECORD—Filed June 27, 1961

Come the parties hereto by Counsel pursuant to C. R. 75.06 and stipulate that the record herein on appeal to the Court of Appeals shall consist of the entire original record, and the Clerk is hereby requested to prepare same for transmission to and filing in the office of the Clerk of the Court of Appeals including this Stipulation.

Millard Cox, Counsel for James B. Beam Distilling Company.

William S. Riley, Counsel for Department of Revenue.

Dated June 27th, 1961.

[fol. 43]

[File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

[Title omitted]

NOTICE OF APPEAL—Filed June 21, 1961

Notice is hereby given that Petitioner, James B. Beam Distilling Company, appeals to the Court of Appeals from the final Judgment of the Franklin Circuit Court entered in favor of Respondent, Department of Revenue, in this action on the 9th day of June 1961.

Millard Cox, Counsel for James B. Beam Distilling Co., 1022 Kentucky Home Life Building, Louisville 2, Kentucky, JUniper 3-0291.

Dated:

June 20, 1961

[fol. 44]

[File endorsement omitted]

IN THE FRANKLIN CIRCUIT COURT

Civil Action No. 60459

[Title omitted]

ORDER RE PREPARATION AND TRANSMITTAL OF ORIGINAL
RECORD—June 27, 1961

Pursuant to stipulation by the parties hereto and approval thereof by the Court, the Clerk is hereby directed to prepare for transmission and filing in the Office of the Clerk of the Court of Appeals the entire original record in this case.

HENRY MEIGS,
Judge.

Dated June 27, 1961

[fol. 45] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 46]

IN THE COURT OF APPEALS OF KENTUCKY

JAMES B. BEAM DISTILLING Co.,

vs.

DEPT. OF REVENUE.

MINUTE ENTRY—September 11, 1961

Came appellant by counsel, and filed briefs and notice.

[fol. 47]

MINUTE ENTRY—September 11, 1961

Came parties, by counsel, and filed agreement, treated as a joint motion for an extension of time to October 9, 1961, for appellee to file briefs, which motion is sustained. 9/7/61.

[fol. 48]

MINUTE ENTRY—October 13, 1961

Came appellee, by counsel, and filed briefs and notice. The Court being sufficiently advised, the above styled case is ordered submitted October 13, 1961

[fol. 49]

MINUTE ENTRY—October 20, 1961

Came parties, by counsel, and filed joint motion to advance, which motion is sustained. 10/20/61.

[fol. 50]

IN THE COURT OF APPEALS OF KENTUCKY

JAMES B. BEAM DISTILLING COMPANY, Appellant,

VS.

DEPARTMENT OF REVENUE, Appellee.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JudgeOPINION OF THE COURT BY CHIEF JUSTICE STEWART—
March 1, 1963

REVERSING

This is an appeal by James B. Beam Distilling Company from a judgment of the Franklin Circuit Court upholding a ruling of the Kentucky Tax Commission, which denied appellant's claim for a refund of taxes on distilled liquors. The sum of \$5107.09 was paid to the Department of Revenue between September 1, 1959, and April 1, 1960, under the provisions of KRS 243.680(2), which reads:

"(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax [fol. 51] of ten cents on each proof gallon contained in the shipment.

"(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment.

"(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department."

Appellant's position is this statute is unconstitutional because it conflicts with article 1, section 10, clause 2 of the Constitution of the United States, which reads:

"No State shall, without the consent of the Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Appellant is the sole distributor in the United States of a brand of Scotch whisky called "Gilbey's Spey Royal." The whisky is produced in Scotland, received by appellant [fol. 52] at its Kentucky plant at Clermont in Nelson County by direct shipment from Scotland, and then sold by it to its customers in the domestic markets throughout this country. The record shows, which is not disputed, that this whisky is an import; that it has been brought in from another country; and that the tax was collected while the whisky remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer.

Before appellant can bring this whisky into Kentucky, it must obtain a permit pursuant to KRS 243.680(2)(c); and, as a condition precedent to the issuance of the permit, it must pay a tax of 10¢ per proof gallon on the whisky to be imported.

Since the case of *Brown v. Maryland*, 12 Wheat, 419, 25 U. S. 419, 6 L. Ed. 678, the United States Supreme Court has held that the above-quoted constitutional provision, known as the "import-export clause," protects goods imported for sale while they are in their original packages and have not been sold or used by the importer. "Use" by the importer of such goods does not include their storage preparatory to sale. Storage does not cause the goods to lose their character as imports. This is true even if the goods, such as the liquor in the case at bar, will only be sold for delivery in Kentucky. See *State v. Board of Review, City of Milwaukee, et al.*, 15 Wis. 2d 330, 112 N. W. 2d 914.

Even though the tax is denominated as something else, such as occupational tax (*Brown v. Maryland*, *supra*), an excise tax (*Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69, 91 L. Ed. 80); or an ad valorem tax (*Hooven & Allison v. Evatt*, 324 U. S. 652, 89 L. Ed. (1252)), if, in fact, it is a tax on imports, as that term is interpreted by the Supreme Court of the United States, the [fol. 53] levy is invalid. The tax in the case at bar is an occupational or license tax in form, but appellant maintains it is nevertheless a tax on imports in fact.

Appellee argues that the Twenty-first Amendment to the Constitution of the United States has changed the rule regarding a state's right to tax imports. Section 2 of this amendment reads: "The transportation or importation into any state or territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This point has been dealt with by courts of other jurisdictions.

In the case of *Parrot & Co. v. San Francisco, Calif.*, 280 Pac. 2d 881, the City of San Francisco levied and collected an ad valorem property tax on some imported liquor which was still in its original unbroken packages, was stored in separate lots in warehouses and was undisposed of by the original importer by consignment or sale. That court held the second section of the amendment did not repeal the import-export clause of the Constitution of the United States insofar as intoxicating liquors are concerned. The opinion states:

" . . . The two sections (of the amendment), in their application to foreign imported liquor, are quite clearly complementary. The import-export clause permits the federal government exclusively to regulate and tax all imports from foreign lands, including liquors, as long as they remain imports, but when the importation is completed and the liquor is being transported or imported into one of the states for delivery or use therein the power of the state attaches. The obvious purpose [fol. 54] of the 21st amendment was to preserve the intra-state jurisdiction of the states so as to grant constitutional protection to those states desiring to remain or to become 'dry.' "

That court concluded such imported liquor was not subject to the city's ad valorem tax. A similar ruling was handed down by the Supreme Court of Wisconsin in *State v. Board of Review, City of Milwaukee*, supra, where the City of Milwaukee undertook to assess for the purpose of city taxation certain wines and liquors imported directly from various foreign countries. That court held that the assessment on the wines and liquors still in the original packages, unconsigned and unsold, violated the import-export clause and was therefore void.

Appellee contends it has authority to impose the tax under the Webb-Kenyon Act. See U. S. C. A., Title 27, Chapter 6. We do not agree. The two sections of this Act bestow upon the several states the power either to prohibit the transportation of any and all liquors into a state, if that particular state happens to be "dry," or to regulate the traffic in liquors within a state, if that particular state is "wet." Clearly this Act does not by its language confer upon a state the right to tax liquors in contravention of the import-export clause of the federal Constitution; furthermore, it was not the purpose of this Act to accomplish that purpose. The case of *Carter v. Virginia*, 321 U. S. 131, 88 L. Ed. 605, relied upon by appellee to sustain its right to levy the tax under consideration, simply does not, in our view, uphold any such right or imply in any wise that the import-export clause of the Constitution of the United States may be ignored where the taxation of direct [fol. 55] imports of foreign origin is involved.

It cannot be said the tax in question is an inspection measure, as appellee seems to suggest. Neither KRS 243.680(2), nor the regulation implementing this statute, provides for actual inspection of the imported whisky. Actual inspection must be provided for in order that the statute may come under the exception noted in the import-export clause of the federal Constitution. See 29 Am. Jur., Inspection Laws, sec. 4, pp. 369-370. Kentucky makes no independent inspection of imported distilled spirits, but accepts the inspection made by the Alcohol & Tobacco Tax Division of the Bureau of Internal Revenue. See KRS 244.230.

In the final analysis, we conclude the language of KRS 243.680(2) makes it plain the incidence of the tax is the act of transporting or shipping the distilled spirits under consideration into this state. It is our opinion, under the facts presented and under the authority of the Wisconsin and the California cases, extensively referred to above, and the legal principles of both of which we adopt as the law of Kentucky, the whisky is not subject to the tax collected under KRS 243.680(2). It follows that appellant is entitled to the relief sought, namely, a refund of the amount heretofore paid.

Wherefore, the judgment is reversed and remanded for further proceedings not inconsistent with this opinion.

Attorney for Appellant: Millard Cox, 1021-1023 Ky. Home Life Bldg., Louisville 2, Kentucky.

Attorneys for Appellee: William S. Riley, Paul D. Ross, Hal O. Williams, Department of Revenue, Capitol Annex, Frankfort, Kentucky.

[fol. 57]

IN THE COURT OF APPEALS OF KENTUCKY

JAMES B. BEAM DISTILLING COMPANY, Appellant,

VS.

DEPARTMENT OF REVENUE, Appellee.

Appeal from a judgment of the Franklin Circuit Court.

JUDGMENT—March 1, 1963

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for proceedings not inconsistent with the opinion herein, which is ordered to be certified to said Court.

It is further considered that the appellant recover of the appellee, its costs herein expended.

[fol. 58]

IN THE COURT OF APPEALS OF KENTUCKY

MINUTE ENTRY—March 22, 1963

Came appellee, by counsel, and filed notice and motion for an extension of time to and including April 29, 1963 to file petition for rehearing.

[fol. 59]

MINUTE ENTRY—April 8, 1963

Came appellee, by counsel, and filed motion for an extension of time to and including April 29, 1963 to file petition for rehearing, which motion is sustained. 4/1/63.

[fol. 60]

MINUTE ENTRY—May 3, 1963

Came appellee, by counsel, and filed petition for rehearing and notice.

Came appellant, by counsel, and filed response to petition for rehearing and notice.

[fol. 61] PETITION FOR REHEARING (omitted in printing)—
Filed April 29, 1963.

[fol. 62] RESPONSE TO PETITION FOR REHEARING (omitted in printing)—Filed May 3, 1963.

[fol. 63]

IN THE COURT OF APPEALS OF KENTUCKY

ORDER OVERRULING PETITION FOR REHEARING—
May 24, 1963

The Court being sufficiently advised, it is considered that the petition of appellee for a rehearing be and the same is overruled.

[fol. 64] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 65]

SUPREME COURT OF THE UNITED STATES

No. 389—October Term, 1963

DEPARTMENT OF REVENUE, Petitioner,

vs.

JAMES B. BEAM DISTILLING COMPANY.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted and the case is placed on the summary calendar. The case is set for oral argument immediately following No. 116.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Brennan took no part in the consideration or decision of this petition.